A

PP

v.

RAZALI JOHARI

B

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
SULONG MATJERAIE JCA
SULAIMAN DAUD JCA
[CRIMINAL APPEAL NO: W-05-9-2002]

C

22 SEPTEMBER 2008

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(2) - Trafficking in 738.31 grams cannabis - Charge amended to one of possession under s. 6 by learned judge - Whether learned judge correct in*

D *amending charge based on facts and evidence of case*

This was the prosecution's appeal against the learned judge's decision in amending the charge of trafficking under s. 39B(2) of the Dangerous Drugs Act 1952 ('DDA') against the accused to

E one of possession under s. 6 of the same. The drug in question was 738.31 grams cannabis. The accused was sentenced to 12 years' imprisonment and whipping under the amended charge.

Held (dismissing the prosecution's appeal)

Per Gopal Sri Ram JCA delivering the judgment of the

F **court:**

(1) The learned judge was correct in excluding the statements made by the accused to the police at the material scene on the grounds that they were made after arrest and without a

G caution being administered. The learned judge was also correct in holding that the accused was under arrest at the point of time at which he made the statements in question. Based on the authorities, statements including any gestures, such as pointing, made by the accused herein after his arrest were

H inadmissible as they were made in the absence of a prior caution. (para 3)

(2) The mere finding of the drug in the room occupied by the accused was insufficient for the charge of trafficking. It has

I been repeatedly held that to constitute trafficking there must be proof of some overt act on the part of an accused and that mere passive possession is insufficient. Also, for the

prosecution to be able to rely on the presumption of trafficking under s. 37(da), there must be evidence of circumstances from which a court may draw the irresistible inference that the accused has the *mens rea* possession. (para 4)

(3) After a meticulous examination of the facts, the learned judge came to the correct conclusion that the accused merely had passive possession of the drug in question. The evidence led by the prosecution showed that the accused committed no overt act. Also, there was no evidence whatsoever to prove that the accused had the *mens rea* possession of the drug in question to bring the case within s. 37(da) DDA – the only fact being that the accused was in occupation of the room where the drug in question was found. It followed that the learned judge was entirely correct in amending the charge to one of possession and in passing the sentence he did. (para 5)

(4) The issue of criminal intention, *ie*, *mens rea* possession, is one of inference to be drawn from proven or admitted facts. An appellate court in the absence of a serious misdirection does not readily interfere with such a finding. In the present case, there was no such misdirection on the part of the learned judge. (para 6)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan pendakwaan terhadap keputusan yang arif hakim kerana meminda pertuduhan pengedaran di bawah s. 39B(1) Akta Dadah Berbahaya 1952 ('DDA') terhadap tertuduh kepada pertuduhan milikan di bawah s. 6 DDA. Dadah jenis kanabis berkenaan adalah seberat 738.31 gram, dan di bawah pertuduhan pindaan tertuduh telah dihukum 12 tahun penjara serta sebatan.

Diputuskan (menolak rayuan pendakwaan)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

(1) Yang arif hakim betul dalam menyingkir kenyataan yang dibuat oleh tertuduh kepada polis di tempat kejadian atas alasan bahawa ianya dibuat selepas tangkapan dan tanpa amaran dibacakan kepada tertuduh. Yang arif hakim juga betul dalam memutuskan bahawa tertuduh berada di bawah tahanan pada

masa kenyataan tersebut dibuat. Berdasarkan kepada autoriti, sesuatu kenyataan, termasuk apa-apa isyarat seperti menunjuk kepada sesuatu yang dibuat oleh tertuduh selepas tangkapannya adalah tidak boleh diterima-masuk, disebabkan ianya dibuat tanpa amaran terdahulu diberi kepadanya.

(2) Penemuan dadah di dalam bilik yang didiami oleh tertuduh semata-mata adalah tidak memadai bagi menampung satu pertuduhan pengedaran. Keputusan demi keputusan telah dibuat oleh mahkamah-mahkamah yang menunjukkan bahawa, bagi membuktikan pengedaran, harus ada bukti mengenai satu perlakuan tidak berselindung di pihak tertuduh, dan bahawa pembuktian milikan pasif semata-mata adalah tidak mencukupi. Selain itu, untuk bergantung kepada anggapan pengedaran di bawah s. 37(da) DDA, hendaklah wujud keterangan mengenai halkeadaan dari mana mahkamah boleh membuat inferens tidak dapat tidak bahawa tertuduh mempunyai milikan *mens rea*.

(3) Selepas meneliti fakta-fakta dengan cermatnya, yang arif hakim telah mencapai keputusan yang betul bahawa tertuduh hanya mempunyai milikan pasif dadah berkenaan. Keterangan seperti yang dikemukakan oleh pendakwaan menunjukkan bahawa tiada apa-apa perbuatan tidak berselindung telah dilakukan oleh tertuduh. Juga, tidak terdapat apa-apa keterangan yang menunjukkan tertuduh mempunyai milikan *mens rea* dadah berkenaan untuk membawa kes ke lingkungan s. 37(da) DDA – dengan satu-satunya fakta hanyalah bahawa tertuduh mendiami bilik di mana dadah berkenaan ditemui. Ianya mengikut bahawa yang arif hakim betul dalam meminda pertuduhan kepada pertuduhan milikan dan menjatuhkan hukuman seperti dengan sekadarnya.

(4) Isu niat jenayah, iaitu milikan *mens rea*, adalah satu perkara inferens yang harus dibuat dari fakta-fakta yang dibuktikan atau diakui. Dalam ketiadaan apa-apa salah arahan serius, sesebuah mahkamah rayuan tidak akan sebegitu mudah mengganggu dapatan-dapatan yang dibuat oleh mahkamah di bawah dengan cara di atas. Dalam kes semasa, tidak terdapat salah arahan seperti itu yang dilakukan oleh yang arif hakim.

Case(s) referred to:
Asan Tharayil v. State of Kerala [1981] Cri LJ 1165 ***(refd)***
Emperor v. Nga Kyaing AIR [1926] Rang 1120 ***(refd)***
Jayaraman Velayuthan & Ors v. PP [1982] CLJ 464; [1982] CLJ (Rep) 130 FC ***(refd)***
Khabiruddin v. Emperor AIR [1943] Cal 644 ***(refd)***
Lee Lian v. PP [1956] MLJ 191
Lim Kah Wan v. PP [1985] 2 CLJ 473; [1985] CLJ (Rep) 530 HC
PP v. Hairul Din Zainal Abidin [2001] 6 CLJ 480 HC
PP v. Kang Ho Soh [1991] 3 CLJ 2914; [1991] 3 CLJ (Rep) 557 HC
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC
Y Jeyamuraly Yesiah v. PP [2007] 5 CLJ 605 CA

Legislation referred to:
Dangerous Drugs Act 1952, ss. 37(da), 39A(2), 39B(2)

For the accused - Muhammad Hasif Hassan; M/s Hasif Azham Rizal & Co
For the prosecution - Jamhirah Ali

Reported by Usha Thiagarajah

JUDGMENT

Gopal Sri Ram JCA:

[1] The accused (respondent before us) was charged for trafficking in 738.31 grams of cannabis, an offence punishable under s. 39B(2) of the Dangerous Drugs Act 1952 ("the Act"). At the close of the prosecution's case the learned trial judge, acting on the evidence before him, amended the charge to one of possession under s. 6 of the Act punishable under s. 39A(2). The accused pleaded guilty to the amended charge and was sentenced to 12 years imprisonment from the date of his arrest. Whipping was also imposed. The prosecution being dissatisfied with the decision of the learned judge to amend the charge appealed to this court. We heard and dismissed the appeal. The reasons for our decision are now produced.

[2] The facts of the case are these. On 24 October 2000 at about 5.15am, PW7 (Chief Inspector Chia Aik Chin) acting on information that he had received conducted a raid on a house in Jalan Datuk Keramat, Kuala Lumpur. The front door was unlocked. So, the police party entered. PW7 found four men lying asleep on the floor of the living room. Two members of the police

party, namely, PW7 and PW8 went to the middle part of the house. There they found a room (we will refer to it for convenience as the middle room) that was padlocked. They then went to the kitchen and found the accused sleeping there. They searched the accused and found a bunch of three keys in his trouser pocket. One of these opened the padlocked middle room. On being questioned, the accused made certain statements (including pointing at a bag) about the occupation of the middle room and its contents. It is in evidence that PW7 found a shoebox containing 190 clear packets of dry leaves. There was a leather bag on a shelf in the room. It was found to contain 290 clear packets of dry leaves and two compressed materials one wrapped in clear plastic and the other in foil. Subsequent chemical examination found these exhibits to contain a total of 738.31 grams of cannabis. It is also in evidence that while in the room the police found a pair of trousers from which they extracted the accused's identity card and some cash.

[3] At the trial, the prosecution sought to adduce the statements made by the accused to the police at the scene. The learned judge excluded these on the grounds that they were made after arrest and without a caution having been administered. We are in agreement with the learned judge's decision on this point. Whether a person was under arrest in given circumstances is a pure question of fact. See, *PP v. Kang Ho Soh* [1991] 3 CLJ 2914; [1991] 3 CLJ (Rep) 557. On the facts before him, the learned judge was entirely correct in holding that the accused was under arrest at the point of time at which he made the statements in question. It is settled law that any statement made by a person after his or her arrest is inadmissible unless made under caution. See, *Jayaraman Velayuthan & Ors v. PP* [1982] CLJ 464; [1982] CLJ (Rep) 130; *Public Prosecutor v. Kang Ho Soh*. And, in this context, for purposes of determining admissibility, acts of pointing or other gestures are regarded as statements. See, *Emperor v. Nga Kyaing* AIR [1926] Rang 1120; *Khabiruddin v. Emperor* AIR [1943] Cal 644; *Lee Lian v. Public Prosecutor* [1956] MLJ 191; *Lim Kah Wan v. Public Prosecutor* [1985] 2 CLJ 473; [1985] CLJ (Rep) 530; *Asan Tharayil v. State of Kerala* [1981] Cri LJ 1165; *Y Jeyamuraly Yesiah v. PP* [2007] 5 CLJ 605. It follows from these authorities that the statements, including any gestures, such as pointing, made by the accused after his arrest were inadmissible as they were made in the absence of a prior caution.

[4] The other point made by the prosecution was that the mere finding of the drug in the room occupied by the accused was sufficient to bring home the charge of trafficking. The learned judge rejected this argument. We are in agreement with the learned judge. It has been repeatedly held that to constitute trafficking there must be proof of some overt act on the part of an accused and that mere passive possession is insufficient. See, *PP v. Hairul Din Zainal Abidin* [2001] 6 CLJ 480. And for the prosecution to be able to rely on the presumption of trafficking under s. 37(da), there must be evidence of circumstances from which a court may draw the irresistible inference that the accused had *mens rea* possession before the court can hold an accused as having been found in possession of a dangerous drug. It was held by the Federal Court in *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457 that:

> ... where the prosecution intends to rely on the presumption under s. 37(da), it is necessary for it to prove by positive evidence – and not by the presumption under s. 37(d) – all the ingredients of possession in law. If there is a failure to prove those ingredients, then the prosecution would fail to establish a case of trafficking through the vehicle of s. 37(da).
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> [20] Now, as to what the ingredients of possession in law has been established by a long line of cases. We find it unnecessary to discuss all of them here. Suffice that we refer to two of them. In *Toh Ah Loh & Mak Thim v. Rex* [1948] 1 LNS 72. Gordon-Smith Ag CJ when delivering judgment of the Singapore Court of Appeal explained the meaning in law of the word 'possession' when appearing in a statute. His lordship said:
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> > Possession, in order to incriminate a person, must have the following characteristics. The possessor must know the nature of the thing possessed, must have in him a power of disposal over the thing, and lastly must be conscious of his possession of the thing. If these factors are absent, his possession can raise no presumption of *mens rea*, without which (except by statute) possession cannot be criminal.
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> [21] The second is *Saad Ibrahim v. Public Prosecutor* [1967] 1 LNS 154 where Yong J stressed the necessity of establishing the ingredient of knowledge on the part of an accused before he could be incriminated with possession. His Lordship there said:

> In my opinion mere possession is one thing and possession with *mens rea* is another. Possession which incriminates must have certain characteristics. The possessor must be aware of his possession, must know the nature of the thing possessed and must have the power of disposal over it. Without these characteristics possession raises no presumption of *mens rea*. Without *mens rea* possession cannot be criminal except in certain cases created by statute, which is not applicable in this case.

[22] We would also mention the learned judgment of Lim Beng Choon J in *Public Prosecutor v. Badrulsham bin Baharom* [1987] 1 LNS 72, which contains a full discussion of the several cases on the point.

[23] We accept these authorities as correctly stating the law. It follows that where the prosecution seek to prove trafficking by relying on s. 37(da), it must to prove at the trial, all the ingredients of possession set out in the cases of *Toh Ah Loh and Mak Thim* and *Saad Ibrahim*.

[5] In the present case, the learned judge after a meticulous examination of the facts came to the conclusion that the accused merely had passive possession of the drug in question. We agree. That the accused committed no overt act is amply borne out by the evidence led by the prosecution. So too there is no evidence whatsoever to prove that the accused had *mens rea* possession of the drug in question to bring the case within s. 37(da). All that we have is the fact that the accused was in occupation of the middle room and the drug in question was found there. On these facts the learned judge was entirely correct in reducing the charge to one of possession and in passing the sentence he did.

[6] At the end of the day, the issue of criminal intention – in this case *mens rea* possession – is really one of inference to be drawn from the proved or admitted primary facts. An appellate court in the absence of a serious misdirection does not readily interfere with such a finding. In the present case there is no such misdirection on the part of the learned judge. We therefore had no alternative but to dismiss this appeal.